

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7417 OF 2004

Shri Ganesh Gopal Aphale .. Petitioner.
V/s.

1. Smt.Indirabai Gopal Aphale
& Others .. Respondents.

Mr.C.S.Joshi for petitioner.

Mr.N.J.Patil for respondent Nos.2 to 4.

Mr.A.V.Joshi for respondent Nos.1(a) to 1(b).

CORAM : S.C.DHARMADHIKARI, J.

DATE : 19th NOVEMBER, 2007.

P.C.:

1. Mr.Joshi appearing for the petitioner submits that the Executing Court has failed to provide any opportunity to the petitioner before it relied upon the Commissioner's Report and passed an order in accordance therewith. He submits that there are specific objections raised by the present petitioner to the Commissioner's Report and a copy of the same is annexed at Annexure "C" at page Nos.72 to

74 of the petition paper book. He submits that these objections were submitted as early as on 6th February, 2003. He submits that the objections at Annexure "C" and "D" are on the record of the Executing Court but no opportunity has been given to the petitioner to examine the Commissioner or any other witness in support of the plea that the property has not been distributed in accordance with the decree and that the area, which is computed in the Report is not accurate.

2. I have heard the learned Counsel appearing for parties and perused the petition and the annexures thereto, including the request application of the decree holder.

3. I made it clear to Mr.Joshi that the Commissioner's Report cannot be discarded in the manner suggested by the petitioner as it has been placed on record on 10th April, 2002 alongwith a map. Further, that Execution Application is pending from 1995. In such circumstances, while impressing upon Mr.Joshi, the aspect that the matter needs to be disposed of expeditiously, I have also made it clear to him that the Commissioner's Report will remain on record. This is not objected by Mr.Joshi but his specific request is that opportunity be

given to the petitioner - original defendant No.2.

4. The petitioner is a judgement debtor No.2. It appears from record that when there were specific objections, the Executing Court could not have proceeded on the basis that there is no error, which is pointed out in Commissioner's Report or that the objections raised do not appear to be genuine. Such findings could have been rendered only after the Court was satisfied that nothing could be elicited after examination of the Commissioner or other witness or that the opportunity granted was not availed of by the judgement debtor No.2.

5. In the above circumstances and in the facts peculiar to this case, I am of the view that the petitioner-judgement debtor No.2 deserves to be granted one opportunity to have the Commissioner examined. Mr.Joshi states that the petitioner-judgement debtor No.2 may be allowed to examine one witness at least in addition to examining the Commissioner.

6. I made it clear to Mr.Joshi that the number of witnesses to be examined by the petitioner-judgement debtor No.2 shall be only one in addition to examining the Commissioner. All this exercise must be completed by the

petitioner-judgement debtor No.2 within the time stipulated by this Court and no further extension will be granted under any circumstances by the Court below. In the above facts and circumstances, the following order would meet the ends of justice :-

i) Parties to appear before the Trial Court on 27th November, 2007. If the parties so appear, then, the Trial Court not to insist upon the Commissioner's Report being taken as final and the decree being executed in accordance therewith but shall permit the petitioner before him (judgement debtor No.2) to examine the Commissioner and the witness to be examined by the judgement debtor No.2 within the time stipulated by the Trial Court and he shall not seek any extension in that behalf.

ii) If on the date fixed and decided upon by the Trial Court, the petitioner-judgement debtor No.2, fails to examine the Commissioner, although, he is present or after the examination of the Commissioner is concluded, fails to produce the witness to be examined by him, the Trial Court to proceed with the execution of the decree on the

basis of the Commissioner's Report and also the same is not objected to by any of the parties to the litigation. Thereupon, the Trial Court to proceed and have the decree executed and enforced in accordance with the Commissioner's Report, which is already on record.

iii) However, if the Commissioner is examined and the witness is also examined by the petitioner-judgement debtor No.2, then, the Trial Court to consider the objections of the petitioner-judgement debtor No.2 alone alongwith the available material and pass an order afresh without being influenced by the earlier orders or the observations therein.

iv) The entire exercise to be completed by the Trial Court within a period of four weeks from the date of appearance of parties.

7. Petition is disposed of in the above terms. No order as to costs.

(S.C.Dharmadhikari, J.)